

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: November 8, 2018

525048

In the Matter of FREDERICK
SMITH,
Appellant,

v

MEMORANDUM AND ORDER

ANTHONY J. ANNUCCI, as Acting
Commissioner of Corrections
and Community Supervision,
Respondent.

Calendar Date: September 18, 2018

Before: Lynch, J.P., Devine, Clark, Aarons and Rumsey, JJ.

Frederick Smith, Ossining, appellant pro se.

Barbara D. Underwood, Attorney General, Albany (Martin A. Hotvet of counsel), for respondent.

Appeal from a judgment of the Supreme Court (Ceresia, J.), entered March 31, 2017 in Albany County, which, in a proceeding pursuant to CPLR article 78, granted respondent's motion to dismiss the petition.

Petitioner, an inmate, sought to commence this CPLR article 78 proceeding to challenge a determination of respondent finding him guilty of violating certain prison disciplinary rules. The amended order to show cause directed petitioner to serve a copy of the signed order, the petition, exhibits and any supporting affidavits upon respondent and the Attorney General by first class mail on or before October 21, 2016. Petitioner

failed to serve the required documents on the Attorney General by the return date, and respondent moved to dismiss the petition for lack of personal jurisdiction. Supreme Court granted the motion and petitioner now appeals.

We affirm. "It is well established that failure of an inmate to comply with the directives set forth in an order to show cause will result in dismissal of the petition for lack of personal jurisdiction, unless the inmate demonstrates that imprisonment presented obstacles beyond his or her control which prevented compliance" (Matter of Marino v Annucci, 146 AD3d 1241, 1241 [2017] [citation omitted], appeal dismissed and lv denied 29 NY3d 1025 [2017]; see Matter of Thomas v Selsky, 34 AD3d 904, 904 [2006]). The affidavits supporting respondent's motion to dismiss established that the papers were not timely served on the Attorney General. Notwithstanding petitioner's assertion that he lacked sufficient funds for postage to effectuate timely service, he has not demonstrated that imprisonment prevented his compliance with the order to show cause (see Matter of Hall v Benziger, 163 AD3d 1382, 1383 [2018]; Matter of Hickey v Goord, 3 AD3d 802, 802-803 [2004]). Accordingly, the petition was properly dismissed (see Matter of Hall v Benziger, 163 AD3d at 1383; Matter of Marino v Annucci, 146 AD3d at 1242). The remaining issues raised by petitioner, to the extent they are properly preserved, have been considered and found to be without merit.

Lynch, J.P., Devine, Clark, Aarons and Rumsey, JJ.,
concur.

ORDERED that the judgment is affirmed, without costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive style with a large, stylized 'R' and 'M'.

Robert D. Mayberger
Clerk of the Court